IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 847 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

HARIJAN ASHOK @ ASHWIN

Appearance: Mr.K.P. Raval, Assistant PUBLIC PROSECUTOR, for the appellant.

MR MJ BUDDHBHATTI, amicus curiae.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 08/08/2003

ORAL JUDGEMENT

1. Being aggrieved by the order of acquittal recorded by the learned Judicial Magistrate, First Class, Dhrangadhra, in Criminal Case No.803 of 1988, the State has preferred this Acquittal Appeal.

2. Respondents 1 and 2 herein are the original accused of the aforesaid Criminal Case. They were subjected to trial before the learned Judicial Magistrate, First Class, Dhrangadhra in connection with the aforesaid Criminal case for the offences punishable under Sections 457, 380, 511, 411, 34 and 75 of the

Indian Penal Code.

Both the accused were charged for the offences punishable under Sections 457, 380, 511, 411, 34 and 75 of the Indian Penal Code, and they were tried by the Judicial Magistrate, First Class, Dhrangadhra. As per the complaint of the original complainant, one Mr.Mohansinh Kesarsinh Zala, who was serving as Security Officer in Dhrangadhra Chemical Works, the incident in question had taken place between 18.00 and 6.00 hours of 6th May, 1988 and 7th May, 1988, and the complaint was lodged on 7th May, 1988 at about 8.00 a.m. The complaint was registered as Guna Register No.75 of 1988.

The case of the Prosecution is that while the complainant was at his home on the relevant day, Watchman of Dhrangadhra Chemical Works informed him that theft has taken place at the house of Mr.Bhatnagar, Chemical Engineer of the aforesaid Dhrangadhra Chemical Works and there is a house breaking of said Mr.Bhatnagar. The complainant thereafter went to Mr.Bhatnagar's house, along with the watchman and it was found that some miscreants, in order to commit theft, broke open the lock of the said Bungalow and had committed theft of certain articles. Mr.Bhatnagar was out of station on the relevant day. Thereafter, on the basis of the investigation, accused No.1 Harijan Ashok @ Ashwin, a resident of Jamnagar Town, was arrested on 16.5.1988 by the A.C.B. Police. Ultimately, he was released on bail on 28.4.1989. However, subsequently, since he committed breach of the bail order, he was again arrested.

It seems that, initially, charge-sheet was filed against accused No.1, Harijan Ashok @ Ashwin, and the same was submitted in the Court on 1.12.1988. In the said charge-sheet, names of two absconding accused, i.e. one Siddik Kasam (respondent No.2 herein) and one Joshi Mukund Harilal, were also mentioned. Subsequently, charge-sheet dated 14.11.1988, was filed against the absconding accused, Siddik Kasam, who was arrested and was produced before the Court on 13.11.1988. It seems that, thereafter, the Investigating Officer submitted supplemental charge-sheet on 11.1.1989. The said charge-sheet was taken as a different criminal case, being Criminal Case No.3 of 1989. Thereafter, it seems that the Public Prosecutor gave an application on 28.3.1989 at Exhibit 30 in Criminal Case No.803 of 1988, requesting the Court to re-frame the charge. It seems that a request was made that so far as Accused No.2 is concerned, separate criminal case, viz., Criminal Case No.3 of 1989, was not required to be given simply because

additional charge sheet is given and it was requested that the additional charge-sheet submitted may be taken on record in Criminal Case No.803 of 1988. Ultimately, the Magistrate passed an order below Exhibit 30 to the effect that the charge framed against accused No.1 is to be cancelled and new charge is to be framed. It was also decided that so far as the additional charge-sheet submitted against accused Siddik Kasam is concerned, the same may not be treated as a separate criminal case, but may be treated as a part of Criminal Case No.808 of 1988. Thereafter, ultimately, fresh charge was framed against accused 1 and 2 under Sections 457, 380, 34 and 75 of the Indian Penal Code and, accordingly, charge was framed on 3.8.1989 at Exhibit 38, and the statements of accused were also taken at Exhibits 39 and 40. It seems that accused No.2 had not applied for bail during the pendency of the trial.

So far as the absconding accused, Joshi Mukund Harilal, is concerned, Police submitted that no evidence is available against him and, accordingly, trial proceeded against the present two accused.

After the re-framing of the charge, the accused also gave Purshis that they do not want to lead any further evidence in connection with the re-framing of the charge and they have made a statement that they do not want to cross-examine the earlier witnesses, who have already been examined.

3. The Prosecution examined various witnesses and the learned Magistrate, after considering the evidence on record, oral and documentary, ultimately passed the impugned order, by which he acquitted both the accused and acquitted them from the aforesaid charges. Aggrieved by the said judgment, the State has filed the present acquittal appeal.

4. On behalf of the Prosecution, original complainant, Mohansing Kesarsinh, was examined at Exhibit 11. Over and above the same, the Prosecution has examined about 9 other witnesses. Prosecution has also produced documentary evidence, in the nature of original complaint, panchnamas, finger print expert's report, etc., and, ultimately, considering the evidence on record, the Magistrate came to the conclusion that the Prosecution has failed to prove its case and that both the accused are entitled to be acquitted, and, accordingly, acquittal order is passed.

5. The learned APP, who is appearing in this matter,

submitted that, considering the evidence of Girdharlal Babulal Bechardas at Exhibit 20, both the accused were required to be convicted. He submitted that in view of the circumstances of the case, as well as in view of the documentary evidence as well as considering the oral evidence, it should have been held by the learned Magistrate that the Prosecution has established the case against both the accused and, therefore, conviction order should have been recorded.

6. Since no appearance was filed on behalf of the accused, an application was made to the office that they are not in a position to raise requisite funds, and, therefore, requested for providing a Lawyer. This Court, by its earlier order dated 19.7.2003, requested Mr.M.J. Budhbhatti, learned Advocate, to appear as Amicus Curiae and Mr.M.J. Budhbhatti agreed to assist the Court as Amicus Curiae.

7. In order to find out whether the Prosecution is able to establish its case, it is necessary to examine the evidence of witnesses.

P.W. 1 is the original complainant, Mr.Mohansinh Kesarsinh, who gave the complaint at Exhibit 11. The material evidence is of Girdharlal @ Babulal Bechardas, at Exhibit 20. Mr.Budhbhatti submitted that, looking to the evidence on record, it is dangerous to convict the accused on the basis of the evidence of said Girdharlal, as his conduct is not above board. He submitted that, the said witness is, as such, exposed, as he was indulging in purchasing stolen articles even in the past and, in the instant case, he should have been booked as an accused under Section 411 of the Indian Penal Code, as, with a purpose, he has purchased stolen articles.

At this stage, evidence of said Girdharlal Babulal Bechardas is required to be considered. He has deposed as under :-

In his evidence in Chief Examination, he has stated that he is preparing gold ornaments of the customers and doing labour work in connection with preparing gold ornaments. He has stated that the ornaments in question were purchased by him from Morbi and he has purchased the same from Ashok Maganlal, i.e. accused No.1. He has identified the said accused also. He has also given particulars of the ornaments, which he has purchased. He has also stated in the evidence that the value of the ornaments would work out to Rs.50,000/- to Rs.60,000/-, and he has given Rs.13,750/- to accused

No.1.

In his cross-examination, he has admitted that he is not having any licence for selling/purchasing gold or silver ornaments. He has admitted that, in the past, he had no dealing with the said Ashok Maganlal, i.e., accused No.1, in any manner. He has admitted in his cross-examination that he has not taken any receipt from accused Ashok in connection with the payment of Rs.13,000/- odd. He has also admitted that he has not accounted the said transaction in the account books. He has also admitted that the value of the ornaments in question was about Rs.18,000/- to Rs.20,000/- at the relevant time.

The defence has placed documentary evidence on record for the purpose of establishing the fact that this witness was subjected to criminal cases in connection with dealing with stolen articles in the past.

8. Mr. M.J. Buddhbhatti, at this stage, submitted that both the accused should have been tried separately and joint trial was not permissible. However, since no objection was taken at any point of time before the Sessions Court and since the accused is not able to show any prejudice, the said argument of Mr.Buddhbhatti cannot be accepted.

9. On going through the evidence on record and especially considering the evidence of the said witness, Girdharlal @ Babulal Bechardas, in my opinion, it is not possible to believe that he was totally ignorant of the fact that the things, which are sold to him, do not really belong to the seller. It is difficult to believe that, on the relevant day, he would have readily paid cash of Rs.13,000/-, especially when nothing was produced to show that he was having the said amount on the relevant day. Apart from that, it is not even possible to believe that even though, when he was given the rates of gold at the relevant time, and if that rate was to be considered, the value would come to Rs.45,000/-, he has not tried to ascertain as to why the gold ornaments were sold at a cheap price. A suggestion was also made that he was booked in past in various criminal cases.

10. The accused in their Statement, under Section 313, has stated that the said Girdharlal @ Babulal Bechardas, has falsely tried to implicate them in the case and considering the nature of evidence, I am of the opinion that it is not possible to believe that said Girdharlal @ Babulal Bechardas accepted these ornaments

without the knowledge that the same are stolen articles. The Magistrate, in terms, has observed that the said Girdharlal @ Babulal Bechardas was an accused in some cases. It is required to be noted that there is a charge-sheet on record, in the form of documentary evidence, produced on behalf of the defence against Girdharlal @ Babulal Bechardas. As per the said charge-sheet, which is filed as Charge-sheet No.45 of 1987 before the Chief Judicial Magistrate, Rajkot, the said Girdharlal @ Babulal Bechardas is shown as accused No.1, in connection with offences punishable under Sections 457, 380, 114 and 411 of the Indian Penal Code. The said documentary evidence is part of the paper book. In that view of the matter, it is clear that the said Girdharlal @ Babulal Bechardas was involved in criminal cases for receiving stolen articles in the past and this part has weighed with the Magistrate in acquitting the accused.

11. In my view, it is, therefore, difficult to place any reliance on the evidence of the said Girdharlal Babulal Bechardas. In any case, the Magistrate has given plausible reasons in reaching the conclusion that the accused are required to be acquitted.

Considering the said aspect of the matter, and considering the totality of the evidence, in my view, it cannot be said that the view taken by the Magistrate is not at all plausible considering the evidence on record. This being a criminal appeal against an order of acquittal, even if the view taken by the learned Magistrate is probable, this Court cannot set aside the order of acquittal. Even otherwise, as stated above, considering the evidence of the said witness, viz., Girdharlal @ Babulal Bechardas, it does not seem that he is a creditworthy witness considering the fact that, in the past, he was booked in some cases, as observed by the Magistrate, for receiving stolen properties. There is no other satisfactory corroborative evidence and considering this aspect, I am of the view that the order of acquittal is not required to be interfered with by this Court in this acquittal appeal, as, the Magistrate, after appreciating the evidence on record, has rightly come to the conclusion that the Prosecution has failed to prove the case beyond reasonable doubt.

12. Considering the evidence on record and considering the reasoning of the Magistrate, in my view, it cannot be said that the Magistrate has committed any error in not appreciating the evidence on record properly and in acquitting the accused accordingly. The view of

the Magistrate cannot be said to be unreasonable in view of the evidence on record. If the evidence of Girdharlal is not plausible, then, there is no satisfactory evidence on record, by which guilt of the accused can be established.

Under the circumstances, I am of the opinion that the order of acquittal recorded by the Magistrates is not required to be interfered with, as, it cannot be said that the grounds mentioned by the learned Magistrate for acquitting the accused are not sustainable. Under the circumstances, the acquittal appeal is dismissed.

13. The Court places on record its thanks for Mr. M.J. Budhbhatti, learned Advocate, for assisting the Court as Amicus Curiae.

(P.B. Majmudar, J.)

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(apj)